

## Geography of Armed Conflict: Key Questions:

1. When has the geographic scope of armed conflict ever been dictated by anything other than the threat situation?
2. What authority exists for the assumption that only state-based threats are sufficient in magnitude and risk to justify extraterritorial military response?
3. Is there anything close to a legal, or even doctrinal consensus definition of theater of war?
4. How can a limitation of permissible geography of armed conflict be imposed without offering the opponent a windfall of functional immunity?
5. What type of conduct results in the legitimate designation of belligerent status?
6. Should there be some individualized imminence assessment associated with targeting suspected belligerent operatives outside a hot zone of conflict?

## ***Fishing for a Red Herring: Geography of Armed Conflict***

Identifying a framework for assessing the permissible geography of armed conflict must be driven by both strategic and legal considerations. Armed conflict by its very nature manifests the exercise of national power touching on the most fundamental aspect of sovereignty: the right and obligation of the state to protect itself from internal or external threat. Categories of armed conflict and their associated legal regimes evolved in response to this reality. Up until recently, almost all situations considered sufficient in magnitude to necessitate a full-blown military response took the form of external state threats or internal dissident or insurgent threats. Accordingly, the law of armed conflict responded to these “types” of hostilities, with a continual and important progression of regulatory norms intended to balance the strategic needs of the state with the humanitarian objectives that have always animated conflict regulation.

These categories of armed conflict were always, however, under-inclusive, a conclusion illustrated by U.S. military history. Examples of combat operations that would fail to fit nicely within these two dominant categories of armed conflict include the U.S. participation in the multi-national response to the 1900 Boxer Rebellion in China; the 1916 U.S. punitive raid against Pancho Villa in Mexico; and the U.S. and Allied intervention in the Russian Civil War, resulting in a U.S. force presence on Russian soil through 1921. These examples merely illustrate that armed conflict has never been statically confined to the two categories that became the dominant focus of conflict regulation following World War II, nor have these two categories of armed conflict been the definitive standard for assessing the scope of combat operations.

The post World War II bipolar strategic environment did, however, reinforce the binary nature of situations of armed conflict. Wars were generally confined to the geography of one or two states. Even the limited inter-state armed conflicts of the period lacked the geographic range of operations that defined the two World Wars. Instead, perhaps as the result of the immense perceived risks associated with conflagration, most armed conflicts were generally “self-contained” events. Nonetheless, the perceived U.S. need for global engagement capability was a primary characteristic of national security policy. The Cold War was indeed defined by the strategic capacity to meet any threat, in any location, in the form in which it presented itself.

The end of the Cold War blew the proverbial lid off of a pot that had been simmering this entire period: the threat of international terrorism. While perceived as a sub-text of the global bi-polar struggle until this time, this threat soon came into its own as a national security challenge. While the risk associated with international terrorism became increasingly apparent, the modality for protecting against this risk was anything but. During the decade preceding September 11<sup>th</sup>, this manifested itself in tremendous operational uncertainty, especially for the armed forces. Counter-terrorism was viewed as one of the many potential military missions that

fell into the category of 'Low Intensity Conflict' or 'Military Operations Other Than War', but how would that mission be characterized? At times, it was best understood as military support to international law enforcement. At times, it took the form of combat operations (such as the cruise missile attack against suspected al Qaeda targets in response to the African Embassy bombings). Whatever the legal characterization, one thing seemed increasingly clear: the scope of operations would, like virtually all other military missions, be threat driven.

The impact of the U.S. military response to the terrorist attacks of September 11<sup>th</sup> on theories of conflict classification is in large measure yesterday's news. While certainly not an accepted theory of armed conflict, the increasingly common use of the term transnational armed conflict, or TAC, to denote an armed conflict against a non-state threat in various global environments suggests a broader recognition of the under-inclusiveness of the binary armed conflict framework. There is also no question that this TAC concept has generated substantial consternation, consternation that has been in large measure the result of the link between the assertion of this type of armed conflict and the geographic scope of military operations it purports to endorse.

Prior to September 11<sup>th</sup> and the advent of TAC, there was virtually no discourse on the permissible geographic scope of armed conflict. This is unsurprising, considering almost all armed conflicts of this period were internal, or relatively confined inter-state conflicts. Even when internal armed conflicts "spilled over" into neighboring territories, it was not generally understood to suggest an authority to conduct "global" operations against the non-state insurgent enemy. Use of the term "Global War on Terror" fundamentally altered this understanding. Suddenly, a state was invoking the authority to engage what it determined were belligerent operatives wherever the opportunity to do so arose. Exacerbating this assertion of scope was the fact that early in the struggle, U.S. global reach and dominant combat capability made it clear that this enemy could not afford the risk of "basing" operations out of operational clusters confined to one geographic area. Instead, dispersion had to, by necessity, become the modus operandi of this new enemy.

Of course, this dispersion itself fueled the criticism of the armed conflict characterization. Critics pointed consistently to the "organization" and "intensity" criteria endorsed by the International Criminal Tribunal for the Former Yugoslavia in the Tadic appeals decision for assessing the existence of non-international armed conflict. The U.S. response seems to have been to adopt more of a totality of the circumstances approach to assess the existence of armed conflict, which allows the intensity of risk to offset the organization factor. In many ways, this seems justified, particularly where the effectiveness of operations against an opponent disables the ability of that opponent to manifest traditional organizational characteristics. Proponents of TAC implicitly understand that a strict two-prong test for armed conflict produces a perverse windfall for the transnational terrorist enemy: as their operations become more unconventional and dispersed, the authority of the state to

press the attack dissipates. Recent speeches by Obama Administration officials seem to indicate that the assessed risk of future terrorist attacks is driving the decision to mount unrelenting pressure on al Qaeda. Depriving the state of the freedom of maneuver to press the advantage against a degraded non-state enemy is ultimately inconsistent with this strategic and operational imperative.

Where the U.S. presses this advantage has been and remains the other major source of consternation with the TAC concept. Critics assert an inherent invalidity to a claim of armed conflict authority that exceeds the geographic bounds of a “hot” conflict zone of operations. While limited spillover operations into contiguous states may be tolerable in limited circumstances, extending combat operations to the territory of states far removed from a traditional battle-space is condemned as the ultimate manifestation of an overzealous conception of armed conflict. This criticism cuts to the core of the TAC concept. Expansive geographic scope was the very genesis of TAC, an invocation of LOAC principles to address a transnational non-state belligerent threat. However, this relationship between the scope of counter-terror military operations and the evolution of the TAC concept also reveals that like other evolutions of armed conflict typologies, it was the strategic reality that drove the law applicability assessment, and not the vice versa.

The U.S. response to the September 11<sup>th</sup> terrorist attacks indicated an intent to use combat power to target terrorist capabilities whenever and wherever the opportunity arose. While combat power would not be the exclusive modality to achieve this objective, unlike previous counter-terror efforts it did become a significant, and in many cases primary modality. Of course, selecting between military force and other capabilities involved a complex assessment of a variety of considerations, including the feasibility of alternate means to disable the threat – a classic illustration of national security policy-making. What was clear, however, was that the nature of the threat drove the response modality.

While this approach seemed to defy accepted international law categorizations of armed conflict, it was never really remarkable. National security strategy is always threat driven: intelligence defines the risk created by various threats; strategy is developed to prioritize national effort to protect the nation from these threats, to include defining the tools of national power that will be leveraged to achieve this objective. When national security policy makers determine that military power must be used as one of these tools, this is translated into a military mission. That mission is then refined in the form of military strategy, which seeks to identify threat vulnerabilities and match combat capabilities to address them. Once again, the nature of the threat becomes the dominant driving force in this strategic analysis. Thus, when the threat capability and/or vulnerability is identified outside a zone of “hot” conflict, it in no way nullifies the imperative of addressing the threat. In short, as others have noted, once the armed conflict door is open, threat based strategy means the conflict follows the belligerent target.

In conventional inter-state armed conflict, this process is relatively unremarkable. One need only consider events such as the sinking of the Bismark in the South Atlantic during the opening phase of World War II, or the “small war” in East Africa between Great Britain and Germany during World War I to recognize that conflict historically follows the belligerent. But the more unconventional the threat becomes, the less comfortable this concept feels. When non-international armed conflicts were almost all internal in nature, this produced very little concern. But it is a mistake to assume this was the result of some inherent international legal invalidity of extending such conflicts beyond the territory of one state or perhaps the border regions of geographically contiguous states. Instead, like all armed conflicts, it was the nature of the threat that drove the inherent geographic constraint associated with internal armed conflict. Indeed, the examples of cross-border spillover operations bolsters this conclusion. From Vietnam, to Turkey, to Angola, to Rwanda, to Afghanistan, when states perceived the strategic necessity of expanding an internal armed conflict into the territory of a neighboring state based on the threat dynamics, they have always done so.

Seeking to identify some legally mandated geographic boundary for armed conflict of any type is, therefore, a red herring. Armed conflict is a threat driven concept, arising when the threat necessitates resort to combat power, and extending to wherever the enemy threat manifests itself. This does not, however, mean that the uncertainties created by the intersection of threat based scope and TAC are insignificant. To the contrary, extending the concept of armed conflict to a transnational non-state opponent has resulted in significant uncertainties related to the assertion of state power. But attempting to decouple the permissible geography of armed conflict from threat driven strategy by imposing some arbitrary legal limit on the geographic scope of TAC is an unrealistic and ultimately futile endeavor. Instead, other solutions to these uncertainties must be pursued.

This process is already well underway. One example is the “unable or unwilling” test for the use of military force to address a terrorist threat highlighted by the scholarship of Professor Ashley Deeks. This concept seeks to identify a rational limitation for use of military force outside hot conflict zones: situations of genuine necessity. The effort to provide greater meaning to the concept of direct participation in hostilities is another example, although one that has itself produced almost as many questions as it has answers.

In my opinion, at the operational level, most of the consternation associated with the TAC concept is not the result of geographic scope, but instead the uncertainty produced by the complexity of threat recognition. The nature of the terrorist enemy defies traditional threat recognition methodologies: no uniform, no established doctrine, no consistent locus of operations, and dispersed capabilities. This has always been a challenge with unconventional belligerent opponents. Yet for some reason, when this threat recognition uncertainty was confined to the geography of one state it was never perceived to be as problematic as it is in the context of TAC. In some ways, this is inexplicable. In both contexts, the

unconventional nature of the enemy increases the risk of mistake in the engagement process. What seems to drive much of the consternation, however, is the perception that this risk increases proportionally as with the attenuation from a hot zone of operations (whether this is legitimate is far from certain).

The law of conflict regulation seems to be, accordingly, at a critical crossroads. If threat drives strategy, and strategy drives the existence of armed conflict, the concept of TAC seems an unavoidable reality in the modern strategic environment. Of course, opponents of TAC believe limiting armed conflict to inter-state hostilities or traditional internal armed conflict would eliminate the uncertainties associate with TAC. I believe, however, this would only drive states to adopt sub rosa invocations of the same type of power under the guise of legal fictions. Concepts such as self-defense targeting, or internationalized law enforcement might avoid the armed conflict characterization, but they would do little to resolve the underlying uncertainties associated with TAC. Even worse, they would inject regulatory uncertainty into the planning and execution of military counter-terror operations, and expose those called upon to put themselves in harms way to protect the state to legal liabilities based on inapposite legal norms.

If, however, TAC is an accepted reality and the geography of TAC is threat driven, then it seems imperative to consider how the law will respond to the uncertainties created by this reality. What type of conduct results in the legitimate designation of belligerent status? Should there be some individualized imminence assessment associated with targeting suspected belligerent operatives outside a hot zone of conflict? How certain must an operational commander be before reaching this conclusion? Should capture instead of kill be a legal obligation outside the zone of hot operations? Should there be a presumptive termination date for belligerent detention authority, requiring the state to justify continued detention by some burden sufficiently weighty to protect individuals from indefinite detention?

These are all important and legitimate questions that should be the focus of legal debate and analysis. TAC may provide a principled framework within which to assess the questions, but it has in no way conclusively resolved them. Instead, it was originally conceived as a typology of armed conflict that reconciled the strategic imperative of robust global counter-terror authority, the denial of an unjustified implied legitimacy for the terrorist enemy, with the obligation to respect fundamental LOAC norms in the execution of such operations (to include the detention and treatment of captured terrorist belligerents). No other typology met all of these requirements, requirements that drove the U.S. response to September 11<sup>th</sup>. The lingering questions associated with this effort to synchronize strategic objectives with legal regulation must be the focal point of critical analysis of the future of unconventional warfare.